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**IN THE
COURT OF APPEALS OF INDIANA**

DWAYNE NOBLE,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 82A01-0609-CR-384

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D02-9801-CF-85

March 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Dwayne Noble appeals the eighty-five-year sentence imposed upon resentencing for his convictions for attempted murder as a class A felony,¹ attempted child molesting as a class A felony,² and for his status an habitual offender. Noble raises one issue, which we revise and restate as whether the trial court exhibited personal bias toward Noble in resentencing him. We affirm.

The Indiana Supreme Court found the following relevant facts on Noble's first direct appeal:

In January 1998, [Noble] went to the home of Bessie Clark. Clark and Noble had previously dated, and they remained on friendly terms. The two visited for several minutes, then both departed. When Clark left, she told S.J. to lock the door behind her; S.J. was staying with Clark at the time.

Noble later returned to Clark's home, knocked on the door, and asked S.J. if he could come in and retrieve some cigarettes that he had left there. S.J. allowed Noble to enter. S.J. then went to the bathroom. When she came out, Noble was standing outside the bathroom door. Noble picked S.J. up, carried her into the restroom, and sat her on the sink countertop. Noble next unzipped his pants, exposed his penis to S.J., and told her to "open [her] mouth." S.J. refused. Noble then began choking S.J. and told her if she told anyone about the incident, he would kill her. S.J. soon lost consciousness.

When S.J. awoke, she was covered in blood and found a knife stuck in her neck. She called her mother and her aunt, and then dialed 911.

The State charged Noble with attempted murder and attempted child molesting as class A felonies and the jury found him guilty. The trial court sentenced Noble to forty years for attempted murder and added thirty years for Noble's status as an habitual offender. It ordered a consecutive sentence of forty years for attempted child molesting.

¹ Ind. Code §§ 35-41-5-1(a) (2004), 35-42-1-1(1) (2004).

² Ind. Code §§ 35-41-5-1(a) (2004), 35-42-4-3 (2004).

Noble v. State, 725 N.E.2d 842, 844-845 (Ind. 2000) (citations and footnotes omitted). The Indiana Supreme Court affirmed Noble's convictions and the sentence of one hundred and ten years. Id. at 849.

On May 22, 2000, Noble filed a pro se petition for post-conviction relief ("PCR"). On November 10, 2000, Noble, represented by counsel, filed an amended petition for PCR, which was granted on April 6, 2006. On June 28, 2006, a resentencing hearing was held. The trial court resentenced Noble to serve consecutive terms of thirty years for attempted murder enhanced by thirty years due to Noble's habitual offender status, and twenty-five years for attempted child molesting, for an aggregate sentence of eighty-five years.

The issue is whether the trial court exhibited personal bias when it resentenced Noble. "The law presumes that a judge is unbiased and unprejudiced." Timberlake v. State, 753 N.E.2d 591, 610 (Ind. 2001), reh'g denied, cert. denied, 537 U.S. 839, 123 S.Ct. 162 (2001). "Personal bias stems from an extrajudicial source meaning a source separate from the evidence and argument presented at the proceedings." Bahm v. State, 789 N.E.2d 50, 54 (Ind. Ct. App. 2003), clarified on reh'g by 794 N.E.2d 444 (Ind. Ct. App. 2003) (affirming prior decision and clarifying impact of that decision on Bahm's possible issues and arguments on rehearing), trans. denied. "Adverse rulings on judicial matters do not indicate a personal bias or prejudice, nor typically do statements at sentencing hearings." Id. at 55. Furthermore, "merely asserting bias and prejudice does not make it so." Massey v. State, 803 N.E.2d 1133, 1138-1139 (Ind. Ct. App. 2004). In order to rebut the presumption of nonbias or prejudice, Noble must establish "from the

judge's conduct actual bias or prejudice that places [Noble] in jeopardy.” Id. “Such bias and prejudice exists only where there is an undisputed claim or where the judge expressed an opinion of the controversy over which the judge was presiding.” Id.

Noble argues that the trial court displayed apparent bias during his resentencing. However, Noble fails to offer any cogent argument as to how or why the trial court exhibited any bias whatsoever. Noble only refers repeatedly to the trial court's statement, prior to sentencing Noble, explaining why the prior sentence was not authorized and why a new sentence was required. The trial court stated:

To the family, sometimes a Judge, ladies, has discretion in what he can do, that is he has a choice. He can pick this number or that number and that, in those cases it's entirely up to the Judge based on what he thinks is appropriate. In this case, the Judge, I had no choice about setting aside the prior sentence because it violated the law. The law did not permit the sentence of 110 years under the circumstances and that's why it was set aside. Not because someone thinks that this wasn't a serious crime or that Mr. Noble doesn't deserve a serious punishment. The law simply did not permit the sentence that was handed down at the time that it was given. So the Court – it was not one of those cases where I had a choice in what I could do. I was required by law to do what I did.

Appellant's Appendix at 46; Resentencing Transcript at 20. Noble does not explain to this court how the trial court's statement shows bias or prejudice. Failure to put forth a cogent argument acts as a waiver of the issue on appeal. Davenport v. State, 734 N.E.2d 622, 623-624 (Ind. Ct. App. 2000), trans. denied. Consequently, Noble has waived this argument. See, e.g., Sheperd v. Truex, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004) (holding that “we will not consider an appellant's assertion on appeal when he has failed to present cogent argument supported by authority and references to the record as required by the rules”).

We agree with the State that Noble has not carried his burden of proof on this issue. As previously stated in this opinion, “merely asserting bias and prejudice does not make it so.” Massey, 803 N.E.2d at 1138-1139. Noble has failed to establish that the trial judge’s conduct showed actual bias or prejudice which placed Noble in jeopardy. Id. Instead, a review of the record indicates that the trial judge, in the presence of the victim’s family, attempted to explain why Noble’s prior one hundred and ten year sentence was violative of the law and why the trial judge was constrained to impose a lesser sentence. We agree with the State that the judge “made no statements that could even remotely be described [as] personal attacks on Noble based on extra-judicial sources.” Appellee’s Brief at 5. Therefore, we cannot find that the trial court exhibited bias or prejudice in resentencing Noble. See, e.g., Allen v. State, 737 N.E.2d 741 (Ind. 2000) (holding that facts of the case did not support a rational inference of bias or prejudice).

For the foregoing reasons, we affirm Noble’s eighty-five-year sentence for attempted murder as a class A felony, attempted child molesting as a class A felony, and his status as an habitual offender.

Affirmed.

CRONE, J. concurs

SULLIVAN, J. concurs in result